

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

FILED
U. S. BANKRUPTCY COURT
WESTERN DISTRICT OF N.C.

FEB - 8 1991

In Re:

CAROLINA APPLE PROCESSORS
COOPERATIVE, INC.,

Debtor.

Case No. 90-10753
Chapter 11

BY: BARON GROSHON
Deputy Clerk

JUDGEMENT ENTERED ON FEB - 8 1991

**ORDER DETERMINING CLAIM OF HAAS FINANCIAL CORPORATION;
REQUIRING REJECTION OF EQUIPMENT LEASE;
AND GRANTING RELIEF FROM STAY TO RECOVER EQUIPMENT**

This matter is before the court on the motion of Haas Financial Corporation ("Haas"): (1) for determination that Haas' claim for post-petition rental of certain equipment is allowable as an administrative expense; (3) to require the debtor's assumption or rejection of Haas' equipment lease; and (3) for relief from the automatic stay to recover possession of equipment Haas leased the debtor. At the hearing on these motions the debtor announced its decision to reject Haas' equipment lease and to allow recovery of the equipment by Haas. Consequently, the court will provide in this Order for rejection of Haas' equipment lease and grant relief from the stay to permit Haas' recovery of its equipment. With respect to Haas' claim for an administrative expense, the court has concluded that Haas is entitled to an administrative expense claim, but that the debtor has satisfied that claim by payments it had previously made to Haas. Conse-

quently, no additional administrative expense will be allowed for Haas¹, and its motion is denied to that extent.

BACKGROUND FACTS

The debtor, Carolina Apple Processors Cooperative, Inc. ("CAP"), is in the business of processing and bottling apple juice from fruit or concentrate. Its plant has two bottling lines. In December 1989, CAP and Haas entered into an Equipment Lease Agreement pursuant to which CAP leased two Krones "fillers." The rental provided in the Equipment Lease Agreement was "20 quarterly rental payments in advance (A) commencing with a first rental payment of \$43,172.40 due on the date hereof, and (B) followed by quarterly rental payments of \$21,586.38 due on the first day of each January, April, July and October commencing March 1, 1990." (Emphasis added). The body of the Equipment Lease Agreement was dated as of "December __, 1989" and the attached "Schedule No. 1" which contained the quoted rental provision was dated "January __, 1990;" but the attached "Acceptance Certificate" dated by CAP on "Jan. 17, 1990," acknowledges its acceptance of the equipment on "February 8, 1990," and notes that it was "mailed to Haas...2-21-90."

The Krones fillers were custom manufactured equipment and had a total sales price of \$325,000. Krones invoiced CAP for \$20,000 of the total price of the fillers and CAP paid that amount directly to Krones in January 1990. Krones manufactured

¹ This Order does not purport to deal with the treatment of any damages that Haas may claim pursuant to its Equipment Lease Agreement or otherwise.

the fillers and sold them to Haas for \$305,000 who leased them to CAP.

CAP paid Haas several rental payments: the \$43,172.40 "first rental payment" on January 18, 1990; and two "quarterly rental payments" of \$21,586.38 April 4, 1990, and \$21,586.38 on July 31, 1990.

CAP received the two Krones fillers on February 8, 1990. One filler was installed on one of the bottling lines and operated to bottle juice. It has been in place on the bottling line at all times since initially installed, but CAP has actually operated the line to bottle juice for only thirty-two days of the year that CAP has had possession of the fillers. The second filler has never been installed on the bottling line or operated to bottle juice, but some of its parts have been removed and installed on the other, operating filler.

CAP made no rental payments to Haas after the July 1990 payment. CAP filed its Chapter 11 bankruptcy petition on October 9, 1990. It continued to retain possession and exercise control of the two Krones fillers up to the February 5, 1991 hearing on Haas' motion.

DISCUSSION

Haas' motion for an administrative expense claim pursuant to 11 U.S.C. § 503(b) raises two issues: First, whether the debtor's post-petition use and possession of the equipment merits administrative expense status; and, second, if so, in what amount. The court finds it unnecessary finally to determine the

first issue because it has concluded that, even assuming Haas is entitled to an administrative expense claim, it has been fully compensated for that claim.

Administrative Expense Status

Section 503(b)(1)(A) provides for allowance of an administrative expense for "the actual, necessary costs and expenses of preserving the estate...after commencement of the case...." The parties have cited two differing interpretations of the meaning of § 503: Haas promotes the line of cases that hold that the debtor's exercise of control over the property is the appropriate standard for measuring preservation of the estate for the benefit of creditors. Kneeland v. American Loan & Trust Co., 136 U.S. 89, 10 S.Ct. 950, 34 L.Ed. 379 (1890); In re Fred Sanders Co., 22 B.R. 902 (Bankr. E.D. Mich. 1982); In re Energy Resources Co., Inc., 47 B.R. 337 (Bankr. D. Mass. 1985); and In re Funding Systems Asset Mgt. Corp., 72 B.R. 87 (Bankr. W.D. Pa. 1987). The debtor promotes the line of cases that hold that actual use by the debtor for the benefit of the estate is the appropriate standard for allowance of an administrative expense claim. Broadcast Corp. of Ga. v. Broadfoot, 789 F.2d 1530 (11th Cir. 1986); In re Jartran, Inc., ____ F.2d ____ (7th Cir. 1984); In re Mammoth Mart, Inc., 536 F.2d 950 (1st Cir. 1976); and In re Dant & Russell, Inc., ____ F.2d ____ (9th Cir. 1988).

This court has previously followed the control test in finding a creditor entitled to an administrative expense claim in different circumstances than presented here. Asheville Fence &

Contr. Co., Case No. A-B-89-00199 (Bankr. W.D.N.C. June 21, 1990). The circumstances of this case would appear to merit administrative expense status for Haas under either standard. Although the fillers were not operated constantly by CAP, they were both actually used by CAP post-petition (one for bottling and one for parts), they were maintained by CAP ready and available for use when needed and were in use for bottling operations (albeit sporadic) up until just before the hearing on Haas' motion. That would appear to constitute sufficient "actual use" to merit allowance of Haas' rental as an administrative expense.

Amount of Expense Claim

There was no evidence offered that the fair and reasonable value of the equipment here was other than that set out in the lease. Consequently, the court accepts the lease as establishing the proper rental rate. However, the lease provided for a "first rental payment" of almost exactly two of the "quarterly rental payments." There was no adequate explanation of the reason for the initial double payment, but its contrast to the remaining nineteen quarterly payments demonstrates that the double payment was not merely for use of the equipment. The court has thus concluded that the fair and reasonable value of the use of Haas' equipment was \$21,586.38 per quarter.

CAP has had possession and use of Haas' equipment for just shy of four quarters (February 8, 1990 to February 5, 1991). The fair and reasonable rental value of the equipment for that period is \$86,345.52. Because CAP's payments to Haas were "in advance"

and because of the double "first rental payment" CAP has already paid Haas \$86,345.16. (The pennies difference in the above calculations is not significant enough to merit an award here).

An alternative approach yields the same result. That approach would be to total the rental payments required by the Lease and apply that total across the twenty quarters on a "straight line" basis. The total rental required by the lease over its term is \$453,313.62. That amounts to a "straight line" average of \$22,665.68 per quarter or \$90,662.72 for the four quarters of CAP's use. While that is greater than the \$86,345.16 CAP has paid to Haas, that difference is more than offset by the \$20,000 CAP paid to Kronos for the equipment to which Haas took title (and of which it will now recover possession).

So, although CAP has not paid Haas anything for the use of the equipment since filing its Chapter 11 petition, its prior payments fully compensate Haas for the fair and reasonable value of the debtor's use of Haas' equipment. Consequently, Haas' claim for allowance of any additional administrative expense should be denied.

It is therefore **ORDERED** that:

1. Haas Financial Corporation's motion to require the debtor to assume or reject its Equipment Lease Agreement dated December, 1989 is granted and the Equipment Lease Agreement is deemed rejected;

2. Haas Financial Corporation's motion for relief from the automatic stay is granted; the stay is modified to permit Haas.

reasonably to recover its property covered by the Equipment Lease Agreement; and the debtor is ordered reasonably to permit removal of that equipment by Haas; and

3. Haas Financial Corporation's motion for allowance of its claim for post-petition rental as an administrative expense is denied and that administrative claim is denied.

This the 8th day of February, 1991.



George R. Hodges
United States Bankruptcy Judge